STATE OF MICHIGAN

COURT OF APPEALS

SINEAD LICARI, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED April 22, 2014
v	No. 314025 Washtenaw Circuit Court
ALLEN LICARI, Defendant/Counter-Plaintiff-Appellant.	LC No. 12-000240-DM

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant Allen Licari appeals as of right the December 28, 2012 divorce judgment granting plaintiff Sinead Licari sole legal and physical custody of their three children, as well as other relief. We affirm in part, vacate in part, and remand to the trial court for further proceedings consistent with this opinion.

Defendant inartfully argues that the trial court erred by reaching child custody and parenting time determinations without addressing whether there was an established custodial environment. In regard to child custody, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Similarly, "[o]rders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005).

"Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding" child custody, *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000), and before determining parenting time. *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010). Here, the trial court did not determine whether an established custodial environment existed, and instead simply applied the preponderance of the evidence burden of proof. The trial court's failure to make a finding in regard to whether an established custodial environment existed was clear legal error. *Kessler v Kessler*, 295 Mich App 54, 62-63; 811 NW2d 39 (2011); *Bowers v Bowers*, 190 Mich App 51, 54; 475 NW2d 394 (1991). The error was not harmless

because the trial court's findings under the relevant best interest factors do not strongly sway us one way or the other as to how the trial court may have ruled on this issue had it been addressed. See *Jack v Jack*, 239 Mich App 668, 670-671; 610 NW2d 231 (2000) (this Court looked to evidence as to where child lived and who child looked to for comfort and guidance, as well as financial considerations, in deciding the issue for first time on appeal); *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009) (same); *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). We therefore remand this case to the trial court for a determination whether an established custodial environment existed.[1] The trial court is free to receive updated information, but is not required to make new best-interest findings regarding child custody unless the new evidence so warrants. *Kessler*, 295 Mich App at 63. In other words, we are not requiring a new evidentiary hearing, or necessarily new findings on the best interest factors. Instead, the court must determine whether an established custodial environment existed and then apply the appropriate burden of proof to its prior findings and any updates received by the court.

Defendant also argues that the trial court abused its discretion by allowing his trial counsel to withdraw on the day of trial and by denying an adjournment, forcing him to represent himself at trial. "We review a trial court's decision regarding a motion to withdraw for an abuse of discretion." *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). We also review a trial court's ruling on a motion for adjournment for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). A trial court abuses its discretion when its decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (quotation marks and citation omitted).

As to the first issue, "an attorney who has entered an appearance may withdraw from the action only on court order." *Coble v Green*, 271 Mich App 382, 386; 722 NW2d 898 (2006); see MCR 2.117(C)(2). In *Withdrawal of Attorney*, 234 Mich App at 432, we recognized that while "[t]he Rules of Professional Conduct are applicable to attorney discipline proceedings, MRPC 1.0(b), and do not expressly apply to counsel's motion to withdraw," it was logical "to consider the question of withdrawal within the framework of our code of professional conduct." Michigan Rule of Professional Conduct 1.16(b) provides in relevant part:

> [A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
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> * * *

[1] We disagree with the *Kessler* Court's apparent conclusion that the failure to make findings on this issue is essentially always harmless error because it establishes the burden of proof, see *Kessler*, 295 Mich App at 62. *Kessler* cited to *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994) for that proposition, but all *Fletcher* said was that de novo review of "the ultimate custodial disposition" was inappropriate, while reinforcing that appellate review on all other issues would require remand unless the error was harmless. *Fletcher*, 447 Mich at 889. As *Jack* and *Brausch* establish, there are circumstances in which it is harmless. In any event, we need not decide that issue because it was not harmless in this case for the reasons stated.

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

In this case, the record before the trial court supported a finding that defendant's counsel's continued representation would result in an unreasonable financial burden on counsel and that defendant had rendered counsel's representation unreasonably difficult. These were both permissible reasons for counsel to withdraw under MRPC 1.16(b). *Withdrawal of Attorney*, 234 Mich App at 432. Additionally, where a client totally fails to cooperate and causes a breakdown in the attorney-client relationship, there is "good cause" for an attorney to withdraw. See *Ambrose v Detroit Edison Co*, 65 Mich App 484, 488-489; 237 NW2d 520 (1975). Here, in the month before trial, defendant totally failed to cooperate with his counsel, causing a breakdown of the attorney-client relationship, providing an additional basis for good cause to withdraw. *Id.* The trial court did not abuse its discretion in granting the motion to withdraw.

Turning to the trial court's denial of the motion to adjourn, " '[a] motion for adjournment must be based on good cause, and a court, in its discretion, may grant an adjournment to promote the cause of justice.' " *Soumis*, 218 Mich App at 32, quoting *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). MCR 2.503(D)(1) provides that "[i]n its discretion the court may grant an adjournment to promote the cause of justice. An adjournment may be entered by order of the court either in writing or on the record in open court, and the order must state the reason for the adjournment." Among the factors that warrant the denial of an adjournment are "numerous past continuances, failure of the movant to exercise due diligence, and lack of any injustice to the movant." *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991).

Here, the record shows that defendant failed to communicate with and help his counsel prepare for trial, resulting in her late request to withdraw, and showing a lack of diligence by defendant. *Tisbury*, 194 Mich App at 20. Additionally, as to whether defendant would suffer injustice, the trial court took judicial notice of the fact that defendant had been in court before and was familiar with court processes. The trial court's denial of the motion to adjourn was not an abuse of discretion. *Soumis*, 218 Mich App at 32.

Next, defendant argues that the trial court erred in staying his various post-judgment motions. However, defendant's claim of appeal was filed on January 4, 2013, and his motions were not filed until February 21, 2013. MCR 7.208(A) provides that:

After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

(1) by order of the Court of Appeals,

(2) by stipulation of the parties,

(3) after a decision on the merits in an action in which a preliminary injunction was granted, or

(4) as otherwise provided by law.

Accordingly, under MCR 7.208(A), the filing of a claim of appeal generally prevents the trial court from amending its orders while the appeal is pending. *Hill v City of Warren (On Remand)*, 276 Mich App 299, 307; 740 NW2d 706 (2007). Accordingly, the trial court did not abuse its discretion in staying defendant's post-judgment motions. *Hofmeister v Randall*, 124 Mich App 443, 445; 335 NW2d 65 (1983) (a trial court has discretion in enforcing its own orders). Nor did the trial court abuse its discretion in denying defendant's motion to set aside the order staying his various post-judgment motions. *Fisher v Belcher*, 269 Mich App 247, 262; 713 NW2d 6 (2005) (we review a motion to set aside an order for an abuse of discretion).[2] Nevertheless, MCR 7.208(A) "only prevents the trial court from amending its orders while the appeal is pending, not after remand." *Hill*, 276 Mich App at 307. Thus, on remand, if still relevant, these motions may be heard.

Finally, defendant argues that the trial court was biased because of a series of decisions it made in litigation before the court. However, "[t]he mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous," is insufficient to show bias or prejudice. *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). And, while defendant repeatedly insinuates that the trial court ruled against him because of bias, he does not provide any facts that even remotely show that bias caused the trial court's rulings. We also decline to remand this case to a court outside the Family Division of the 22nd Circuit Court for Washtenaw County. Defendant provides no evidence regarding the alleged culture of that court. Accordingly, we refuse to remand this case to a different judge or court on remand.

Defendant's remaining arguments on appeal have been abandoned. See *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003); *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993).

The trial court's holdings in regard to child custody and parenting time are vacated, and this case is remanded to the trial court for further proceedings consistent with this opinion. In all other aspects, the divorce judgment is affirmed. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan

[2] Defendant's argument that he was entitled to a hearing in regard to his post-judgment motions is without merit because MCR 7.208(A) prevented the trial court from granting relief and because he was not otherwise entitled to a hearing under MCR 2.612.